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FEDERAL COMMUNICATIONS COMMISSION
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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: PP Docket No. 93-253
Implementation of Section 309(j) of the
Communications Act - Competitive Bidding

Dear Mr. Caton:

On behalf of Interactive America Corporation, I am transmitting herewith an original and nine copies of its Petition for Reconsideration, filed in connection with the above-referenced proceeding.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,



Dennis P. Corbett

DPC:kbs
Enclosures
cc (w/encl.): Howard Griboff, Esq. (By Hand Delivery)

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DEC 27 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

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PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION

Interactive America Corporation ("IAC"), by its attorneys and pursuant to Section 1.429(d) of the Commission's Rules, hereby seeks reconsideration of the Tenth Report and Order, FCC 96-447, released November 21, 1996 ("Tenth R&O") in the above-captioned proceeding.¹

In support whereof, the following is shown.

The Tenth R&O establishes a series of procedural rules to govern the auctioning of spectrum for the Interactive Video and Data Service ("IVDS"). IAC seeks reconsideration of these rules in two critical respects. First, the Commission should adopt a rule requiring full public disclosure by the agency of all material facts known to it relating to the spectrum auction. Second, the rules should be revised to provide that no auctions will be held until the governing rules have been finalized.

¹ Federal Register publication of the Tenth R&O occurred on November 27, 1996. This petition is therefore timely filed under Section 1.4(b) (1) of the Rules.

The urgent need for a rule requiring full agency disclosure of all relevant facts is compellingly illustrated by the most recent IVDS auction notice released by the FCC. Public Notice, Auction of Interactive Video and Data Service, DA 96-1958, released December 4, 1996 (“Notice”). In that notice, the Commission announced, inter alia, the reauction of so-called “defaulted” spectrum from the first IVDS auction, held in July 1994, which included fifteen licenses in markets for which IAC had submitted the high bid. Nowhere in the auction notice, however, does the Commission disclose that IAC is currently prosecuting an appeal, in the United States Court of Appeals for the District of Columbia Circuit, of the FCC’s denial of IAC’s request for postponement of the downpayment deadline with respect to those 15 licenses. The FCC’s failure to disclose this critically important fact has misled potential bidders as to the nature of the spectrum rights on which they are now being invited to bid.² For any party attempting to evaluate this auction, it is highly relevant to know that certain licenses up for reauction are subject to a prior claim that is being actively pursued in the federal court system. IAC has little doubt that if the federal government were to learn that a private auctioneer was selling federal rights to the public without disclosing all material facts, there would be considerable uproar and regulatory intervention. Here, the situation is all the more urgent because the federal government is itself the seller of the spectrum.³

² The FCC’s failure to disclose led IAC to file, on December 17, 1996, an “Emergency Motion for Partial Stay”, a copy of which is attached hereto for the Commission’s convenience.

³ The situation is unfortunately reminiscent of the circumstances surrounding the initial July 1994 IVDS auction, where confusion abounded over the facts concerning the availability of equipment, about which there was little, if any,
(continued...)

Full disclosure is a fundamental obligation typically imposed on all parties to any transaction and recent experience teaches that, insofar as FCC IVDS auctions are concerned, it needs to be enshrined in a rule. Without the discipline of a specific rule, auction notices may continue to be published without key facts needed by parties to make informed decisions about the assets they are expected to bid on. The FCC's rules in this area should not be a "one way street," imposing multiple requirements on bidders, while leaving the agency without traditional, basic obligations that are integral to principles of good faith and fair dealing. The FCC should therefore amend its rules to require timely agency disclosure of all material facts relating to the spectrum it is selling to the public.

Second, the FCC should wait to auction this spectrum for IVDS until it has adopted final rules. In IAC's view, it would clearly better serve the public interest to resolve all issues concerning auction procedures before conducting the auction. Here, the FCC has elected to schedule an auction on the basis of the Tenth R&O while advising potential bidders that the Tenth R&O is itself subject to reconsideration. See Notice at 4. In other words, the auction is to be conducted pursuant to rules that the agency has reserved the right to change after the fact. It would be far more prudent and consistent with sound administrative practice to resolve issues relating to the rules first, and then proceed to auction. Indeed, many of the commenters on the Notice of Proposed Rulemaking, FCC 96-330, slip op. (released Sept. 10, 1996), which led to the Tenth R&O cautioned the FCC to proceed deliberately in this area and to resolve issues relating

³(...continued)

disclosure. See e.g., IAC Emergency Motion for Partial Stay at 4-6 (filed December 17, 1996); IAC Petition for Reconsideration at 2-3 (filed October 2, 1995).

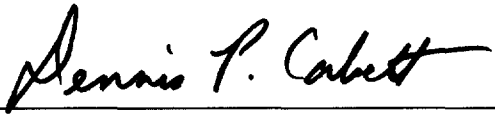
to the first IVDS auction before rushing to any reauction. See, e.g., Comments of ITV, Inc., PP Docket No. 93-253 at 7-9 (filed October 3, 1996); Comments of IVDS Licensees, PP Docket No. 93-253, at 306 (filed October 3, 1996). That advice should be followed now.

CONCLUSION

For the reasons set forth above, IAC respectfully requests reconsideration of the Tenth R&O as set forth above.

Respectfully submitted,

INTERACTIVE AMERICA CORPORATION

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December 27, 1996

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ATTACHMENT

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DEC 27 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Auction Notice and Filing Requirements For
983 IVDS Licenses Scheduled For
February 18, 1997

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DA 96-1958

To: The Commission

EMERGENCY MOTION FOR PARTIAL STAY

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SUMMARY

Interactive America Corporation ("IAC") requests herein an immediate partial stay of the planned February 18, 1997 reauction of the 15 Interactive Video and Data Service ("IVDS") licenses for which IAC was the winning bidder in the initial July, 1994 auction of IVDS licenses. This request is based on a compelling showing under the standard four-pronged stay test of Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). IAC clearly satisfies the traditional four part test for a stay.

First, in IAC's currently pending appeal before the D.C. Circuit, IAC is raising substantial questions on the merits concerning the FCC's denial of IAC's request for additional time to make its downpayment. The FCC failed to give IAC's request the requisite "hard look" and treated IAC in disparate fashion, in contravention of precedent.

Second, a failure to grant the stay will irreparably injure IAC and risk the loss of one or more of IAC's fifteen IVDS licenses, won at the initial auction. The harm visited on IAC and those who may bid at the reauction can and should be avoided by waiting until the courts have finally determined IAC's rights to this spectrum. A new class of claimants should not be needlessly created. The FCC carries particular responsibility in this regard because it has conspicuously failed to put potential bidders on notice that the IAC licenses they are putting up for rebid are the subject of a legal challenge.

Third, no one will be harmed by a stay. IAC is unaware of any operational IVDS system, even more than two years after the initial IVDS auction. The FCC failed to seek expeditious consideration of the appeal, and IAC is seeking to stay only a small part of the reauction. Clearly, delay here will harm no one.

Finally, the public interest will clearly be served by grant of a stay. Among other things, a stay will preserve the agency's objectivity on any remand of IAC's case to the agency for consideration. The FCC should not be looking over its shoulder at a new class of claimants which the FCC itself created and to which it will undoubtedly feel obligated. The grant of a partial stay is therefore necessary to preserve the integrity of the auction process.

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Auction Notice and Filing Requirements For)	DA 96-1958
983 IVDS Licenses Scheduled For)	
February 18, 1997)	
To: The Commission		

EMERGENCY MOTION FOR PARTIAL STAY

Interactive America Corporation ("IAC"), by its counsel, hereby moves the Commission to stay, in part, the announced auction of licenses in the Interactive Video and Data Service ("IVDS"). See Public Notice, "Auction of Interactive Video and Data Service (IVDS)," Report No. AUC-96-13-A (Auction No. 13) (dated December 4, 1996) ("IVDS Reauction Notice"). The referenced action was taken by the Wireless Telecommunications Bureau under delegated authority, but given the importance of this matter and the need for a decision on an expedited basis, IAC is addressing this matter to the full Commission. IAC requests FCC action within 15 days of the filing of this motion. IAC's request for stay is limited to fifteen MSA licenses for which it was the

winning bidder in the initial IVDS auction conducted in July 1994 (hereafter, "IAC Licenses").^{1/}

It would be contrary to fundamental principles of law and public policy for the FCC to reaucton IAC'S spectrum assignments at this time, where the Commission's decision to reject IAC's request for waiver and an extension of the initial downpayment deadline for these licenses remains before the United States Court of Appeals for the D.C. Circuit on review.^{2/} Briefing and oral argument in that case are scheduled to be completed by May 15, 1997, after the Commission's announced reauction date. Compelling legal grounds exist for remand of this matter to the Commission. Should the court rule in IAC's favor, which IAC believes will be the case, any reauction of the rights to these licenses in the interim irreparably harm IAC and compel it to expend unnecessary time and money in pursuit of licenses to which it already has a valid claim, would potentially create a class of new claimants to these licenses, resulting in litigation that

¹ Specifically, IAC was the high bidder for the following spectrum assignments: San Diego, California (License No. ZVM018A); San Jose, California (License No. ZVM027A); Santa Barbara-Santa Maria-Lompoc, California (License No. ZVM124A); Salinas-Seaside-Monterey, California (License No. ZVM126A); Lakeland-Winter Haven, Florida (License No. ZVM114A); Fort Pierce, Florida (License No. ZVM208A); Honolulu, Hawaii (License No. ZVM050A); Las Vegas, Nevada (License No. ZVM093B); Reno, Nevada (License No. ZVM171A); Oklahoma City, Oklahoma (License No. ZVM045A); Tulsa, Oklahoma (License No. ZVM057A); Memphis, Tennessee (License No. ZVM036A); Nashville-Davidson, Tennessee (License No. ZVM046B); San Antonio, Texas (License No. ZVM033A); and Salt Lake City-Ogden, Utah (License No. ZVM039B). In its Public Notice, the WTB lists the IAC licenses among "defaulted" MSA assignments that are available for re-auction. See IVDS Reauction Notice at Attachment A.

² See Interactive America Corp. v. F.C.C., No. 96-1320 (D.C. Cir., filed September 6, 1996), consolidated with Commercial Realty St. Pete, Inc. v. F.C.C., No. 96-1271 (D.C., filed August 7, 1996).

would substantially delay the implementation of IVDS service in the affected markets, and would potentially prejudice any FCC decision concerning IAC on remand of IAC's pending case in the D.C. Circuit. For these and other reasons set forth below, a delay in the auction of these licenses until the court proceeding is resolved is in the public interest.

I. STATEMENT OF THE FACTS

IAC was formed to acquire IVDS licenses it first learned about from advertisements placed by the FCC in major newspapers in early June 1994, which announced an auction of IVDS spectrum to be held on July 28 and 29, 1994, less than two months later. The auction was one of the first two spectrum auctions held by the FCC, it was the only one to follow the "open oral outcry" methodology, and it was plagued by a series of substantial problems. Materials provided to IAC by the FCC touted IVDS technology as providing an array of potential applications, combining "the functions of computers, TV sets and compact-disk players" and allowing users to enjoy such features as selecting camera angles during sporting events, paying bills, ordering food or merchandise (such as pizza "with or without the toppings"), playing video games, or choosing movies-on-demand. The FCC also provided interested parties with Fact Sheets stating that EON Corporation ("EON"), formerly known as TV Answer, Inc., had developed the IVDS technology. EON was the only "type accepted" provider of IVDS equipment identified by the FCC.

IAC attempted to obtain information concerning EON, the new "touted" IVDS service and the technology available to implement it, and was eventually provided

by EON with impressive brochures depicting sleek set-top boxes and remote controls that would be used for IVDS. After the deadline for bidder applications passed on June 27, 1994, less than one month after the auction was first publicized, EON declined to provide additional information to IAC, including specifics concerning technical specifications, costs, or equipment availability. EON stated that it was taking this position because it planned to bid for IVDS licenses itself through affiliated entities, and feared that further discussions with other potential bidders would violate the FCC's rules. IAC was therefore deprived of a critically important opportunity to perform its due diligence.

Despite the limited information available, the combination of FCC publications and EON brochures was a compelling enticement to bid. Just as significantly, there was little time to hesitate, as bidding applications were due within a few weeks, the auction was scheduled to take place one month later, and, once the final gavel came down, these licenses would be gone. All of the IVDS licenses for major metropolitan areas would be assigned at that time. The circumstances compelled interested parties to act quickly, or miss the opportunity to secure an IVDS MSA license.

IAC devised an auction strategy to obtain IVDS licenses in key areas it desired to develop. At the auction, IAC was the high bidder for fifteen licenses for which it had already submitted upfront deposits.^{3/} Almost immediately after the auction, however, but prior to the initial 10 percent downpayment deadline, revelations concerning the status of EON's equipment first began to emerge, suggesting that its

^{3/} See footnote 1, *supra*.

technology was not developed. Among other things, it was reported that EON's reputed primary equipment supplier, Hewlett Packard, was in fact not doing business with EON, contrary to EON's brochures. In addition, it was learned that some elements of EON's technology were subject to existing patent litigation with the original developer, litigation which EON believed threatened the "technological foundation" of its business.^{4/} These stark revelations created immediate doubt concerning the ability of the potential IVDS licensees to meet the strict FCC system implementation deadlines which, *inter alia*, required each licensee to construct ten percent of its system within one year from the grant of its license.^{5/}

In light of this significant new information, IAC did not believe it or anyone else could reasonably be expected to meet the FCC's strict construction deadline. Because the Commission had already made it clear that delays in equipment availability would not justify an extension of the strict one-year build-out requirement,^{6/} IAC found itself in the difficult and unforeseen situation of being required to make a substantial downpayment in excess of \$1,300,000 for the right to construct IVDS facilities within a time-frame that no longer appeared feasible due to the state of equipment availability. In these highly unusual circumstances, IAC believed that it was necessary for the Commission to provide the winning IVDS bidders, prior to the submission of funds, with

^{4/} See Complaint at 2, TV Answer, Inc. v. Morales, No. 128935 (Cir. Ct. Fairfax Co., VA).

^{5/} See 47 C.F.R. § 95.833(a) (1995) (since modified to remove one-year milestone).

^{6/} FCC Public Notice, Mimeo No. 43550, at 8 (dated June 17, 1994) (Answer to Question 5-2).

some assurance that they would not lose their initial investments if they were later unable to meet the one-year construction deadline. IAC reasonably believed it had no choice but to follow established FCC guidelines allowing waivers in special circumstances. See 47 C.F.R. § 1.3. Accordingly, IAC filed in good faith on August 8, 1994 a request for a waiver which sought a 30-day postponement of the initial payment obligation to permit the Commission to provide assurances of its willingness to extend the one-year buildout term and approve competitive equipment suppliers. These concerns were echoed by other winning bidders, many of whom also filed waiver/extension requests. Indeed, the number of separate bidders defaulting or seeking waivers in the initial IVDS auction was extremely high. The IVDS Reauction Notice lists more than 125 separate defaulted markets, representing an aggregate population of more than 96 million.^{2/} IAC specifically cited the equipment uncertainties and the near-term build-out milestone as justification for this brief extension.^{3/}

Just prior to the downpayment deadline, the FCC released a Public Notice under the heading "IVDS Bidder Alert" which stated that it did not intend to change the deadline.^{2/} Within a few weeks after IAC's waiver/extension request was filed, and without making any determination concerning IAC's request, or those of many other similarly situated parties, the FCC initiated an inquiry under Section 403 of the

^{2/} See IVDS Reauction Notice, at Attachment A.

^{3/} See Letter from Christopher M. Pedersen, President, IAC, to William F. Caton, Acting Secretary, FCC, dated August 8, 1994.

^{2/} See Public Notice, "IVDS Bidder Alert," dated August 5, 1994.

Communications Act concerning IAC and one other winning bidder that had not submitted payments on August 8, 1994.

On October 7, 1994, the Common Carrier Bureau summarily rejected IAC's waiver request, and others, in a brief Order that did not give the requisite consideration to the significant arguments raised by IAC in support of a postponement.^{10/} Despite seeking reconsideration of this determination before both the Bureau and the Commission, neither the Commission nor the staff has ever given the request the consideration required under the case law, or addressed the significant problems with the FCC's own conduct of the flawed initial IVDS auction. As a result, IAC sought appellate court review of the Commission's actions on September 6, 1996. This appeal has been docketed and a briefing schedule has been established with oral argument set for May 15, 1997.^{11/} Final determination of IAC's rights to the IAC licenses depends on the outcome of that proceeding.

In light of the pending appeal, it would be improper for the FCC now to reauction the licenses that are the subject of that appeal. Should the Court rule that the Commission was wrong to deny summarily the relief IAC sought in September 1994, as IAC believes it will, then IAC would likely be allowed to make its initial payment for these licenses, obviating any need for a reauction. If an auction is held in the interim,

^{10/} See Requests for Waiver in the First Auction of 594 Interactive Video and Data Services Licenses, 9 FCC Rcd 6384 (CCB 1994).

^{11/} See Order, Nos. 96-1271 and 96-1320 (D.C. Cir., filed December 2, 1996) (briefing schedule).

ignoring the continuing jurisdiction of the D.C. Circuit over this matter, then a whole new class of claimants would be created should entities other than IAC win these licenses at the scheduled February 1997 auction. Both IAC and these new claimants would be injured in such a circumstance. IAC would have been deprived of a full and fair consideration at the FCC of its request for relief on remand, because the FCC will have inevitably been influenced by the fact that it created this second class of claimants, and will feel obliged to take their interests into account. Regardless of who else might bid on the IAC licenses, IAC would also be irreparably injured by the need to undertake the effort and incur the expense necessary to participate in the auction and take post-auction legal action as a means of protecting its existing interests, as well as by the significant risk that it will forever lose the 15 licenses themselves. See pp. 21-22 infra. Other bidders would be injured by becoming unnecessarily embroiled in costly and protracted litigation, set against the backdrop of the FCC's conspicuous failure to disclose the existence of IAC's litigation to prospective bidders. Conversely, if the Court ultimately denies relief to IAC, the FCC could proceed to auction the fifteen licenses claimed by IAC without causing injury to any party. In these circumstances, as further detailed below, the grant of a stay is fully warranted and should be expeditiously granted.

II. ARGUMENT

The standard governing requests for the grant of a stay or injunction is well established before the Courts and the Commission. A movant must establish that: (1) there is a substantial likelihood that it will ultimately succeed on the merits of the matter at issue; (2)

irreparable harm would result to the movant in the absence of a stay; (3) injunctive relief would not substantially harm other parties; and (4) a stay would be in the public interest, or at least would not be adverse to the public interest. See Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 842-844 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. F.P.C., 259 F.2d 921, 925 (D.C. Cir. 1958). These factors are not viewed in absolute terms, but must be viewed in relationship to each other — such that a very strong showing under one or more factors may compensate for a less substantial showing under another factor. Thus, the Holiday Tours Court concluded as follows:

An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Holiday Tours, 559 F.2d at 844.

In the matter presently before the Commission, each of the Holiday Tours factors is met, fully justifying a stay. IAC is raising substantial legal questions before the D.C. Circuit in an already docketed case concerning the FCC's treatment of its request for a postponement of the initial IVDS downpayment deadline, a case on which it believes it will prevail. Moreover, whether or not the Commission agrees with IAC that there is a high probability of IAC's success before the court of appeals, the remaining three factors all strongly support injunctive relief. First, IAC will be irreparably harmed

if the Commission proceeds to reauction licenses for which IAC has previously been declared the high bidder, because IAC will not only be forced to incur expenses to protect its interest in these licenses, but, these efforts notwithstanding, IAC will not control whether a new claimant or class of claimants emerges for some or all of the licenses. If there are such claimants, additional, protracted litigation will ensue. On the other hand, there is currently no entity or class that would be harmed by the exclusion of the IAC licenses from the upcoming auction, as there are not yet any applicants for this auction. Finally, the public interest would be affirmatively served by avoiding the unnecessary confusion and potential litigation that could result from moving to re-sell the IAC licenses before a court has determined whether IAC should retain its right to submit its initial downpayment. Accordingly, all of the Holiday Tours factors favor grant of a partial stay in this matter.

A. IAC Is Likely To Prevail on the Merits.

IAC is raising substantial legal questions in its appeal to the D.C. Circuit. Specifically, the Commission failed to give due consideration to IAC's request for extension of the IVDS downpayment deadline in light of the confusion and concern that had resulted from post-auction disclosures concerning the IVDS equipment market.^{12/} IAC sought only a brief period of time during which it expected that the Commission

^{12/} In the interests of expedition, IAC will not here reiterate all of its arguments on the merits previously presented to the Commission in its Petition for Reconsideration filed with the FCC on October 2, 1995, but, rather, will merely incorporate those arguments by reference.

would provide licensees with reasonable assurances that they would not be held to strict build-out timetables that it was then evident that IVDS licensees would be unable to meet, particularly given the newly discovered problems with EON, the sole type-accepted equipment supplier. There was no reason for the Commission to decline to address this issue — and indeed it ultimately repealed the one-year buildout deadline that was the object of IAC's concern, in effect validating IAC's argument that the deadline was unreasonable given both the changed circumstances created by the decision to auction (rather than award by lottery) the IVDS spectrum^{13/} and the state of the IVDS equipment market, including EON's problems.

In such instances, where a party requests a waiver of the applicability of the Commission's rules in response to unusual or unexpected circumstances, long-established precedent requires that the request be given a "hard look." See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("WAIT Radio"). Instead of giving IAC's request the requisite consideration, the FCC staff, and later the Commission itself, took a reflexive and unyielding hard line that negated any fair consideration of the legitimate concerns that IAC raised. Indeed, even before the waiver request was filed, the FCC issued the Public Notice captioned "IVDS Bidder Alert" that flatly stated that it would not alter its deadline. In addition, within a few weeks following the submission of the extension

^{13/} The one-year milestone had been adopted to deter speculative applications in connection with the Commission's original method of assigning IVDS licenses by random selection. See Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, 7 FCC Rcd 1630, 1641 (1992).

request, the FCC took the highly unusual and totally unwarranted step of instituting a targeted Section 403 inquiry concerning IAC and one other winning bidder that had not submitted payment on August 8, 1994, when in fact, more than 25 entities or individuals had not made the downpayment by that deadline.

Neither FCC staff nor the Commission ever squarely addressed the direct relationship between IAC's request for a brief delay in the timetable for downpayment and the problems it raised relating to the FCC's strict construction milestone deadline. IAC simply sought good faith assurance before tendering a downpayment of over \$1,300,000 that IVDS licenses would not be declared automatically null and void if the one-year milestone was not met.^{14/} The Commission's response, adopting the Bureau's perfunctory dismissal, was that it was inappropriate for IAC to seek such assurance before making its payment^{15/} — in effect suggesting that IAC should have paid first and asked questions later. IAC, however, did not believe that payment of more than \$1,300,000 should be required absent clarification of the Commission's rules, the operation of which could have led to automatic forfeiture of its licenses and the down

^{14/} The Commission had made clear that "[f]ailure to meet the 1, 3, or 5 year requirement will result in automatic cancellation of the license whether obtained by lottery or auction." FCC Public Notice, Mimeo No. 43550, at 9 (dated June 17, 1994) (Answer to Question 5-4) (emphasis added).

^{15/} "We believe, however, that, as stated in the *MO&O*, 'even if petitioners believed that sufficient equipment would not be available to meet the build-out deadline, the appropriate recourse would have been to request a waiver of that build-out deadline, not to withhold their down payment.'" Request for Waivers in the First Auction of Interactive Video and Data Service (IVDS) Licenses, FCC 96-271, slip op. 7 (¶ 11) (released July 11, 1996) (emphasis added).

payment. Indeed, the facts that were revealed only in the auction's aftermath made it clear to IAC that timely construction under the then-effective Commission rules was not feasible. As shown above, that conclusion was shared by an unusually large number of winning bidders.

Fundamentally, all waiver requests are entitled to consideration; IAC's request for guidance on the construction milestone issue coupled with a 30-day postponement of the downpayment deadline was a reasonable request given the troubling post-auction disclosures concerning the status of IVDS equipment development. The Commission's view that IAC should be thrown into a Section 403 inquiry and that IAC's only "appropriate recourse" was to pay up and take its chances is no substitute for reasoned consideration of the particularized request IAC submitted. It is not enough to suggest, as the FCC apparently does, that the appropriateness of a request depends on whether the Commission is disposed to entertain it at a particular time. Any reasoned request for waiver must be given fair consideration when filed.

Even if the FCC ultimately rejected IAC's concerns about the unduly harsh impact of the Commission's one-year milestone rule, it still should have offered IAC an opportunity to make its downpayment. In fact, however, the premises of IAC's request for relief — that IVDS equipment would not be available in a timely fashion, and that a change in the FCC's build-out deadlines was therefore necessary — were wholly sound, and have been proven entirely accurate. IAC's concerns were validated when the

Commission repealed the one year build-out milestone earlier this year.^{16/} The disparity between the Commission's refusal to entertain IAC's request for guidance in the context of its downpayment extension request and its ready acceptance of the need to repeal the one-year build-out milestone in a different proceeding compellingly demonstrates that IAC's initial request was not fairly considered at the time it was filed.

One additional troubling aspect of the Commission's approach to IAC's waiver is the disparity in comparison with its approach to other waiver requests specifically relating to IVDS, and its past lenience in dealing with new services generally. See, e.g., Memorandum from Patti Grace Smith, FCC, to Penny Larson and Judy Opel re: "Auctions hotline Q&A's," dated July 6, 1994 (FCC was going to be liberal in granting waivers to allow the substitution of bidding agents at the initial IVDS auction — "we will bend over backwards to bring them in"); Interactive Video and Data Service (IVDS) Licenses, Request for Stay to Postpone Commencement of Installment Payments Program, DA 95-2029, slip op. (released September 22, 1995) (FCC delayed a payment deadline until 30 days after it had ruled on a request for relief from certain payment

¹⁶ Although the Commission itself did not directly cite equipment availability problems in eliminating the rule, a coalition of IVDS licensees, representing a majority of the entities participating in the proceeding, commented that the change was necessary because "requiring IVDS licensees to construct facilities prior to the development of commercially viable services . . . will impede the development of new and innovative services." See Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service Licensees, 11 FCC Rcd 2472 (¶ 3) (1996). For its part, EON, while supporting the rule's repeal, felt compelled to urge the Commission "that lack of equipment should not be the rationale for the proposed rule change," but was nonetheless constrained to assert only that "equipment will be available before the one-year construction benchmark." Id. at 2472-73 (¶ 4) (emphasis added).

requirements); Amendment of the Commission's Rules to Establish New Personal Communications Services (NPRM), 7 FCC Rcd 5676 (1992); Development of Regulatory Policy in Regard to Direct Broadcast Satellites, 90 F.C.C.2d 676, 707-08 (1982).

Finally, the fact that the FCC has rejected IAC's legal arguments on prior occasions assuredly does not outweigh IAC's right to a fair judicial hearing concerning its claims before a reauction is conducted. If the FCC believed that IAC's appeal should not stand in the way of a reauction, it could have sought expedited consideration for the purpose of resolving the claim prior to reauctioning of IVDS spectrum. In an order dated September 17, 1996, the D.C. Circuit set a deadline of October 17, 1996 for "procedural motions which would affect the calendaring of this case."^{17/} Given the FCC's now apparent desire to move quickly to reauction the very licenses that are subject of that appeal, it was incumbent on the FCC to file a motion at that time seeking expedited consideration. In the absence of such a request in a case where IAC's rights to IVDS licenses are squarely implicated, the FCC is in no position to assert that any need for expedition now justifies its decision to reauction the IAC licenses prior to a decision in the court proceeding.^{18/} Such an approach by the FCC would be tantamount to ignoring the court's jurisdiction over the matter.

^{17/} See Interactive America Corp. v. F.C.C., No. 96-1320 (D.C. Cir. September 17, 1996).

^{18/} The FCC also filed no dispositive motions in this case.